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defense chose not to locate or call any witnesses who had been connected with Office of Strategic Services. *Id.*

Defendant, convicted of conspiracy to obtain defense information, was not entitled to new trial for assertedly newly discovered evidence that his brother who had testified against defendant had assertedly been incompetent as witness by reason of mental condition which government allegedly failed to disclose, where defendant actually knew of brother's mental condition defendant was experienced psychiatrist and it was decided as matter of defense strategy not to subpoena or request production of medical reports or to put psychiatrist on stand. *Id.*

25. Double Jeopardy

Indictment charging that defendant wilfully attempted to communicate and transmit documents relating to national defense to one not entitled to receive them, with reason to believe that they would be used to injury of the United States and to advantage of a foreign nation, would not be dismissed on ground that trial thereunder would constitute double jeopardy because defendant had been convicted under an indictment charging that she obtained possession of documents with specific intent that information be used to injury of the United States and to advantage of a foreign nation, since indictments involved different offenses. *U. S. v. Coplon, D.C.N.Y.1949, 88 F.Supp. 910.*

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

June 25, 1948, c. 645, 62 Stat. 737; Sept. 3, 1954, c. 1261, Title II, § 201, 68 Stat. 1219.

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and forfeiture of all pay and allowances was correct and proper upon conviction for wrongfully and willfully discharging firearm under circumstances such as to endanger human life. U.S. v. Meade, ACMR 1985, 19 M.J. 894.

45. Harassment or prejudicial error

Mistrial, on motion of accused, was required due to members' attendance at commandant's lecture on drug abuse during court-martial proceedings involving possession, transfer and sale of LSD, with commandant, who was the convening authority, stating that drug trafficking was intolerable in the military and that drug traffickers should be "out" of the service. U.S. v. Brice, CMA 1985, 19 M.J. 170.

therefore, the findings as to the wrongful possession charges could not stand; however, because military judge treated each possession specification as multiplicitous with each introduction specification for purposes of sentence, accused's sentence was not enhanced by the failure to set aside the multiplicitous findings, and no relief in sentence was required. U.S. v. Miles, C.M.A. 1983, 15 M.J. 431.

46. — Miscellaneous sentences or penalties appropriate

In view of seriousness of offense and fact that accused had, 12 days prior to instant offense, been convicted of another offense involving improper use of firearms, sentence to bad-conduct discharge, confinement at hard labor for one year

§ 895. Art. 95. Resistance, breach of arrest, and escape

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1. Resisting apprehension—Generally

Plea of guilty to relating apprehension by German police officers was improvident necessitating reassessment of sentence where accused was charged with violating this section, breach of arrest and escape and resisting apprehension of foreign police officials who are not agents of the United States was not a violation of this section but was more appropriately chargeable under section 934 of this title governing disorders and neglects to the prejudice of good order and discipline in the armed forces. U.S. v. Seymour, ACMR 1984, 19 M.J. 608.

4. — Confinement

Where serviceman was being temporarily detained in connection with search of his room and of his person but he was not clearly notified that he was being taken into custody, and surrounding circumstances did not support conclusion that he had been apprehended prior to his flight from his room, he could not be found guilty of escape from custody. U.S. v. Garcia-Lopez, CMA 1983, 16 M.J. 229.

§ 905. Art. 105. Misconduct as prisoner

Notes of Decisions

1. Selective prosecution

Prosecution of accused for communicating with the enemy and assisting American prisoner of war, based on conduct of accused after purportedly being captured by enemy forces in Vietnam, did

§ 906a. Art. 106a. Espionage

(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, anything described in paragraph (8) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning

7. Multiple offenses

In prosecution wherein accused was convicted of specifications alleging that he struck named superior commissioned officer who was then in execution of his office, that on same day he willfully disobeyed lawful command from same named superior commissioned officer to "halt" and that on same day he resisted being lawfully apprehended by same named officer, each of the offenses of concern on review contained at least one element not involved in either of the others, and, as specifications were framed, those different elements were not "fairly embraced" in specifications of the others, and convictions both for assault and for disobedience of lawful order could stand, being not multiplicitous for findings purposes. U.S. v. Costello, CMA 1984, 17 M.J. 132.

9. Connection of offense with service

Information based on Assimilative Crimes Act, 18 U.S.C.A. § 13, charging member of the armed forces with leaving the scene of an accident, in violation of Maine law [29 M.R.S.A. § 894], within federal enclave of naval air station, was not dismissed, in that Maine statute proscribed very different kind of conduct than that conduct punishable under Article 95 of the Uniform Code of Military Justice [UCMJ]. Art. 95, 10 U.S.C.A. § 895j, proscribing the offense of resisting apprehension or breaking arrest. U.S. v. Smith, D.C. Me. 1985, 614 F.Supp. 454.

not constitute impermissible selective prosecution despite contention that others who were suspected of similar offenses were not prosecuted upon repatriation where accused was repatriated long after the others and where there was no evidence of bad faith. U.S. v. Garwood, CMA 1985, 20 M.J. 148.

§ 907. Art. 107. False official statements

Notes of Decisions

4. — Official status of statements

Accused was within the line of duty when he was on temporary assignment to a satellite Navy Relief Society office, and preparation of a standard informational form used in connection with request for financial assistance was a required function of his temporary duty assignment, but the salient issue in determining whether he was properly convicted of falsely signing an official document was not whether he was in "line of duty" status or had a "duty" to prepare the form, but whether the form was an "official document." U.S. v. Lauderdale, NMCMR 1984, 19 M.J. 582.

11. Multiple history statements

Offenses of wrongful appropriation and making false official statement by executing disbarring form which created false entitlement to money in another's name were not multiplicitous for findings purposes where neither was lesser offense of the other, elements were separate, offenses were statutorily separate and offenses were directed at different societal norms. U.S. v. Meade, NMCMR 1985, 20 M.J. 972.

12. Sentence and punishment

Portion of sentence adjudging a find was not illegal, although accused contended that he was not advised during military judge's inquiry into providence of his plea of guilty of worthless check

systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—

- (A) a foreign government;
- (B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or
- (C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

- (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and
- (B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).

(2) Findings under this subsection may be based on—

- (A) evidence introduced on the issue of guilt or innocence;
- (B) evidence introduced during the sentencing proceeding; or
- (C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

- (1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).

(Added Pub.L. 99-145, Title V, § 634(a), Nov. 8, 1985, 99 Stat. 634.)

Legislative History. For legislative history and

purpose of Pub.L. 99-145, see 1985 U.S. Code Cong. and Adm. News, p. 472.

Library References

War and National Emergency 4-48
C.J.S. War and National Defense § 56.